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Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1989

BILL CLINTON, GOVERNOR OF ARKANSAS, ET AL., PETITIONERS

v.

M. C. JEFFERS, ET AL., RESPONDENTS

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

This appeal presents several related questions concerning the determination of liability under Section 2 of the Voting Rights Act, as interpreted in *Thornburg v. Gingles*, 478 U.S. 30 (1986), as well as the ability of the district court to substitute its judgment as to the appropriate remedy for the discretion that should be afforded the Arkansas Board of Apportionment, specifically:

1. Whether the district court erred as a matter of law when it determined that Respondents' inability to elect candidates who are black satisfied Section 2's requirement that they prove "less opportunity to participate in the political process."

2. Whether the district court's ultimate legal conclusion that Arkansas' 1981 Legislative Apportionment Plan violated Section 2 was based on its erroneous application of the legal standards identified in *Gingles*, which resulted in its factual conclusions being either insufficient to support such a finding or irrelevant?

3. Whether the remedy imposed by the district court, which required Petitioners to create racially gerrymandered "super-majority" black districts, was improper because it both lacked a factual basis and failed to defer to the districts proposed by the Board of Apportionment, which contained black voting age populations of between 55 and 58 per cent?

4. Whether the district court abused its discretion when it denied Petitioners' defense of laches to Respondents' Section 2 complaint, which was filed eight years after the apportionment plan was adopted and on the eve of the last election to be held under the plan?

LIST OF PARTIES

The Petitioners, who were defendants in the action below, are Bill Clinton, the Governor of Arkansas, W.J. McCuen, the Arkansas Secretary of State, and Steve Clark, the Arkansas Attorney General, all in their official capacities as members of the Arkansas Board of Apportionment. The Respondents, who were plaintiffs in the action below, are M.C. Jeffers, Al Porter, Evangeline Brown, Clyde Collins, O.C. Duffey, Earl Foster, The Reverend Ellihue Gaylord, Shirley M. Harvell, Linda Shelby, J.C. Jeffries, Lavester McDonald, Joseph Perry, Clinton Richardson, T.E. Patterson, Ernest Simpson, Bryan Smith, and Charlie Statewright.

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No. 89

In the Supreme Court of the United States

OCTOBER TERM, 1989

Bill Clinton, Governor of Arkansas, *et al.*,
Petitioners,

v.

M.C. Jeffers, *et al.*,
Respondents.

JURISDICTIONAL STATEMENT

Governor Bill Clinton of Arkansas, together with the other two members of the Arkansas Board of Apportionment, respectfully submit that this jurisdictional statement presents questions so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

OPINIONS BELOW

The liability opinion and dissent of the district court (J.S. Appx. 1) are reported at 730 F.Supp. 196. The remedy opinion and dissent (J.S. Appx. 192) are as yet unreported.

JURISDICTION

The district court entered its final order with respect to the claim under Section 2 of the Voting Rights Act on March 5, 1990. J.S. Appx. 229. Petitioners filed their notice of appeal on March 14, 1990. J.S. Appx. 232. This court has jurisdiction under 28 U.S.C. Section 1253.

STATUTE INVOLVED

The pertinent part of Section 2 of the Voting Rights Act, as amended, 42 U.S.C. Section 1973, is reprinted at J.S. Appx. 234.

STATEMENT OF THE CASE

This case was the largest, most ambitious Section 2 redistricting challenge ever filed. Respondents challenged Arkansas' dicennial legislative reapportionment plan, which had been adopted in 1981, and claimed that the plan violated the Constitution as well as Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973. A majority of the district court panel[1] held that the plan violated Section 2(b) of the Voting Rights Act and directed petitioners to submit a remedy proposal. Petitioners did so, and, after modifying petitioners' remedial plan in compliance with objections to certain portions of the plan raised by Respondents, the District Court ordered its remedial plan into effect for the primary elections to be held on May 29, 1990.

1. Background

According to the 1980 census, blacks comprised 16.3% of the population in Arkansas. Approximately ½ of Arkansas' black population resides in eastern and southeastern Arkansas in a corridor roughly following the Mississippi River which is commonly known as the Delta. This was the area under consideration in the instant action.

Arkansas reapportions its Legislature every ten years following the federal dicennial census. Ark. Const. Art. 8, Sec. 4. Following the 1980 census, the Arkansas Board of Apportionment, comprised of the Governor, Secretary of State and the Attorney General, convened to reapportion the State. Although primarily motivated by the

[1]This action was tried to a three-judge district court pursuant to 28 U.S.C. §2284(b)(1). Judge Eisele filed his 158 page dissent from majority's liability finding on January 26, 1990.

constitutionally mandated principle of one-man-one-vote, the Board also based its 1981 apportionment decisions on other policy considerations including the undesirability of crossing natural barriers, of splitting cities and other communities of interest or of splitting political boundaries (*e.g.* county lines), a preference for continuity of representation, and a desire to deviate as little as possible from the districts formed by the previous Board of Apportionment. *Jeffers*, 730 F.Supp. 214; J.S. Appx. 34. During the 1981 apportionment process, a coalition comprised of 18 national and local organizations, including the NAACP, obtained copies of the computer census tapes used by the Board, which contained the information later used by Respondents to mount their Section 2 challenge in 1989. J.S. Appx. 52.

Arkansas has had no legal barriers to blacks voting since the poll tax was repealed by its voters in 1964.

2. This Action

a. The Liability Determination

A three-judge District Court heard evidence for twelve days on Respondents' claims.[2] On December 4, 1989, a split court issued an order which declared that the 1981 Apportionment Plan violated Section 2 and enjoined Respondents from conducting any elections under that plan.

The district court based its opinion on its finding that the 1981 apportionment resulted in blacks having less of an opportunity than whites to elect representatives of their choice. It rejected the Petitioners' argument that Section 2, by its plain language, required that Respondents show both unequal opportunity to participate in the political process *and* less opportunity to elect representatives of their choice. The court analogized plaintiffs' burden in Section 2 cases to "putting and chipping" around a golf green in holding that a

[2]Expert testimony consumed approximately three trial days. The remaining nine days were devoted to anecdotal testimony.

plaintiff's showing less opportunity to elect equated to less opportunity to participate.

Noting that the 1981 plan contained five majority black districts out of 135 potential legislative districts,[3] the district court further found that a maximum of 16 majority black voting age population districts could have been created (3 in the Senate and 13 in the House) in 1981. This was accomplished mainly by splitting small cities, which had been completely within single districts under the 1981 plan. The court criticized Respondents' failure to create additional majority black districts in spite of the legitimate state districting policies that required the Board of Apportionment to keep such cities intact within representative districts whenever possible. The district court also found that "voting in the areas of the State in question is markedly polarized by race," but that black voters "exercise significant, sometimes decisive influence," in elections. The location of the district lines under the 1981 plan, the Court noted, "will make it very difficult to elect more than six black legislators, out of a total in both houses of 135 members. And this is so even though black people make up about sixteen percent of the total population of the State of Arkansas." The majority also required no proof that the voters in respondents' proposed districts were "politically cohesive."

Chief Judge Eisele dissented, asserting that the majority had failed to conduct the proper district-specific analysis required in Section 2 cases. A proper analysis, Judge Eisele stated, would lead to the conclusion that Respondents had failed to prove that they lacked equal opportunity to participate in the electoral process, an essential element of a vote dilution claim under Section 2. He also noted that Respondents had failed to prove their case under the standards established by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), in that their alternative districts were not geographically compact

[3]The Arkansas Legislature is comprised of 100 House members and 35 Senate members. Ark. Const. Art. 8, §§2, 3.

because they split small cities heretofore unsplit, and that they failed to prove the political cohesiveness of the black residents in their proposed alternative districts. Judge Eisele also noted that the majority apparently "presumed" that "all blacks, regardless of their differing geographic and political backgrounds, (would) vote as a racial bloc whenever a black candidate (was) opposing a white candidate." *Jeffers*, 730 F.Supp. 241-42, J.S. Appx. 94.

b. The Remedy Imposed.

Petitioners proposed eight new majority black House districts, which had black voting age populations from 53 to 64 percent.[4] Petitioners also proposed two new majority black Senate districts, which had black voting age populations of 55% (SD 30) and 58% (SD 27) respectively.

Respondents objected to two of Petitioners' proposed House districts, which had black voting age populations of 56% (HD 75) and 58% (HD 74), and proposed alternative House districts having 64% and 63% black voting age populations respectively. The majority accepted Respondents' objections because "the Board's (proposed) HDs 74 and 75 would have been held unlawful at the liability stage of this case, simply because they are (1) below 60% BVAP and (2) easily expanded without sacrificing principles of compactness and contiguity." J.S. Appx. 199. Respondents did not object to five of Petitioners other proposed House districts, which had black voting age populations of between 53% and 58%, and the majority did not declare those districts unlawful.[5]

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[4]Only one House district, HD 82 had a black voting age population in excess of 58%.

[5]Notwithstanding the majority's "presumption" that respondents' lack of objection was due to there being "no practical way to increase their BVAP while still meeting reasonable standards of compactness and contiguity," J.S. Appx. 198, reasonable standards of compactness and contiguity did not appear to influence the majority's decision to uphold Respondents' objections to a Senate District proposed by petitioners. *See*, J.S. Appx. 207; Note 14, *infra*, and accompanying text.

Respondents also objected to the two majority black Senate districts proposed by Petitioners, making the same arguments they advanced with respect to Petitioners' proposed House districts, and urged the majority to adopt their alternatives, which had respective black voting age populations of 60.5% (SD 30) and 61% (SD 27). The majority accepted Respondents' objection to SD 30 "(f)or reasons already discussed in connection with the House . . . ." J.S. Appx. 202. However, the majority rejected Respondent's objection to SD 27 while noting "that a higher BVAP in SD 27 could have been obtained simply by adding certain portions of the City of Pine Bluff to the district instead of a largely white township, Cane Creek, located in Lincoln County." J.S. Appx. 201. Having earlier damned the challenged House districts proposed by Petitioners because they failed to articulate "some neutral, non-discriminatory reason for the way (the House Districts) have been drawn by the Board," J.S. Appx. 200, the majority did not find a similar "failure" fatal to SD 27 as proposed by Petitioners. *See*, J.S. Appx. 202. The majority's lack of consistency in evaluating Petitioners' proposed districts appears to spring from its perception that the absence of an incumbent, "is worth at least two or three points." J.S. Appx. 202. As he did from the majority's liability finding, Judge Eisele also dissented from its order on remedy. J.S. Appx. 204.

The district court's opinion has been implemented and primary elections will be held thereunder on May 29, 1990. Petitioners' motions for stay pending this appeal were denied both by the District Court majority (Eisele dissenting) and by this Court.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Introduction. This case appears to represent the triumph of proportional representation as the driving concept behind legislative redistricting decisions; a concept whose triumph would ensure a political structure that can

only be described as "separate but equal."[6] This case presents substantial issues about the circumstances under which federal courts can invalidate state legislative districting plans pursuant to Section 2 of the Voting Rights Act. The court below, applying standards set forth in a case involving at-large voting in multi-member districts, *Gingles*, 478 U.S. 30, struck down Arkansas' 1981 redistricting plan largely because it did not gerrymander the boundaries of single-member districts to create the maximum possible number of majority black districts. It then went on to reject a remedial plan developed by the State because it did not create so-called "super-majority" districts for black voters.

These broad, unprecedented actions warrant plenary review for several reasons. First, the district court applied an incorrect standard to determine whether a Section 2 violation has been established. Although the Act speaks in terms of a dual showing that certain voters have "less opportunity . . . to participate in the political process and to elect representatives of their choice," the court nonetheless held that "a showing that [the voters] have less opportunity to elect representatives of their choice would suffice to establish their claim." *Jeffers*, 730 F. Supp. 204; J.S. Appx. 15. This reading, by essentially eliminating the requirement that the plaintiffs show genuine exclusion from "the political process" as a whole, takes a major step toward making Section 2 into a guarantee of electoral success. But, as this Court made plain in *Whitcomb v. Chavis*, 403 U.S. 124 (1971)—an equal protection case relied on by the drafters of Section 2—it is not enough for voters just to show that they have been outvoted; they must also show that they have been "denied access to the political system." *Id.* at 155. The same requirement should apply under Section 2 and no showing of exclusion from the political process was made in this case. Indeed, the court below specifically found that Respondents had failed to prove that the state legislators were unresponsive to minority voters.

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[6] *See*, Gorger & Cooper, "Waltzing the Color Line," U.S. News and World Report, 22-24 (Nov. 6, 1989); *United States v. Dallas County*, 850 F.2d 1433, 1443-45 (11th Cir. 1988) (Hill, concurring specially).

Second, the district court gave little or no weight to the important, longstanding, and neutral state policies guiding the legislative redistricting plan, apparently concluding that any such policies must yield to the goal of creating more black representation. The result is to require a sort of "reverse gerrymandering" that is unsupported by Section 2. The district court reached that result by a wholesale borrowing of the *Gingles* standards for judging at-large voting systems in multi-member districts. But even *Gingles* makes clear that neutral state policies (there, geographic compactness and contiguity of districts) may override the concern for minority representation. In any event, the placement of boundaries of single-member legislative districts implicates neutral, traditional, and weighty state policies—for example, respect for the boundaries of cities, counties, and other political subdivisions—that are commonly not of concern in the *Gingles* type of Section 2 case. These policies are sufficient to defeat the plaintiffs' challenge in this case. Neither in *Gingles* nor in prior or subsequent cases has this Court fully considered the weight to be given to such policies in the redistricting context.[7]

Finally, the district court went too far in requiring that the state fashion "super-majority" districts as part of a revised plan. Relying on the earlier decision of *Smith v. Clinton*, 687 F.Supp. 1361 (E.D. Ark.) (three-judge court), *aff'd mem.*, 109 S.Ct. 548 (1988), (hereinafter *Smith II*) the court held that it was *required* to reject any proposed plan (assuming compactness and contiguity) that included majority black district with less than a 60 percent black voting-age population. As a statement of remedial principles, this conclusion seems dubious enough; but, in fact, the court explained its holding on the ground that anything less than "super-majority" district "would have been held unlawful at the liability state of this case . . . " J.S. Appx. 199. Again, the court seems to be going well beyond what Congress intended in Section 2.

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[7]The district court's conclusion would distort the aim of Section 2, inviting its use to argue, for example, that unitary executives (*e.g.*,

mayors or governors) be replaced with multi-member executives including minority representation or that a 35-seat legislature be replaced by a 70-seat legislature some of whose (smaller) districts would be minority controlled. This Court has not endorsed any such radical view of Section 2, even in the *Gingles* context of at-large voting systems in multi-member districts. Indeed, *Gingles* implicitly held the contrary when it held that a State may insist on geographic compactness and contiguity (neutral and traditional state policies) notwithstanding the impact on minority voters. Any such view, moreover, would be out of step with other areas of discrimination law, which, even when focusing on effects, do not condemn practices sufficiently justified by neutral policies. *See, e.g.*, 42 USC §2000e, et seq.; *Wards Cove Packing Co. v. Atonio*, ___ U.S. ___, 109 S.Ct. 2115, 103 L.Ed.2d 733 (1989); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

In any event, contrary to the district court's view, the *Gingles* standards for judging at-large voting systems in multi-member districts cannot be transplanted wholesale into the present context. The placement of the boundaries of single-member legislative districts implicates numerous neutral, traditional, and weighty state policies—for example, respect for the boundaries of cities, counties, or other political subdivisions—that are commonly not a concern in the *Gingles* type of Section 2 case. This Court has never considered the weight to be given those policies, for effects-based vote-dilution challenges to legislative redistricting plans are new on the legal scene. *See, Davis v. Bandemer*, 478 U.S. 109, 119 (1986). As the legislative history reveals, when Congress enacted the current version of Section 2 in 1982, there was no equivalent for redistricting cases of the substantial body of case law casting doubt on any policies that might support at-large voting systems in multi-member districts.

Plenary review of the important issues raised in this case is particularly necessary at this time. With the imminent completion of the 1990 census, state legislatures throughout the Nation will soon begin developing and implementing new redistricting plans. The rulings of the court below should not be allowed to affect those plans without full consideration by this Court.

I. THE DISTRICT COURT'S DETERMINATION THAT RESPONDENTS' INABILITY TO ELECT CANDIDATES WHO ARE BLACK SATISFIED

THE STATUTORY REQUIREMENT THAT THEY DEMONSTRATE LESS OPPORTUNITY TO PARTICIPATE IN THE POLITICAL PROCESS WAS ERRONEOUS.

In determining that Respondents have demonstrated a violation of Section 2, the majority held that "even if plaintiffs failed to show less opportunity to participate in the political process, a showing that they have less opportunity to elect candidates of their choice would suffice to establish their claim." *Jeffers*, 730 F.Supp. 204. J.S. Appx. 14. By so holding, the majority below ignored the plain language of Section 2 as well as it committed a purely logical and grammatical error which has resulted in a *de facto* guarantee of minority electoral success.

That the plain meaning of a statute should be conclusive, except in the rare cases in which it will produce a result demonstrably at odds with the intention of its drafters, is an elementary principle of statutory construction. *United States v. Apfelbaum*, 445 U.S. 115, 121, (1980). Both grammatically and legally, use of the conjunction "and" expresses elements of the same grammatical rank within a sentence. *See, Montello Salt Company v. Utah*, 221 U.S. 452 (1911); Warriner & Griffith, *English Grammar and Composition* 184-85 (1963); see generally, G. & C. Merriam Company, *Webster's New Collegiate Dictionary* 43 (1977). As a matter of logic, both elements of a conjunctive sentence, such as the one in Section 2 under discussion, must be true in order for the sentence itself to be true. *See*, S. Barker, *The Elements of Logic* 91, 102 (2d ed. 1974). Further, if one accepts the majority's proposition that proof of a minority's inability to elect representatives of its choice is sufficient alone to establish a Section 2 violation, then there would have been no purpose for Congress' having included the requirement that a minority show that its members have had less opportunity than other electors to participate in the political process; the phrase would be superfluous.

However, a statute should not, absent compelling reasons, be read in a fashion that renders some of its provisions superfluous. *See, Bell v. New Jersey*, 461 U.S. 773, 788-89 (1983). This should be reason enough alone to reject the majority's interpretation of Section 2. However, the majority's determination that Respondents' showing that they have less opportunity to elect candidates of their choice alone would suffice to establish their Section 2 claim, not only is flawed logically and grammatically, but also leads to a result demonstrably at odds with this Court's precedent. Indeed, if it is sufficient to show only an unequal opportunity to elect, it should also be sufficient to just show "unequal opportunity to participate in the electoral process." This Court has consistently held, though, that lack of electoral success is insufficient to make out a Section 2 claim. *Gingles*, 470 U.S. 46; *Whitcomb*, 403 U.S. 156.

This dual standard was inserted into the Voting Rights Act by Congress in the 1982 amendments to the Act, and the concept was adopted directly from this Court's decisions in previous vote dilution cases. These cases, *Whitcomb*, *supra* and *White v. Register*, 412 U.S. 755 (1973), make it clear that the standard requires proof of *both* aspects of the standard. In *Whitcomb*, for instance, the court held that the fact that blacks were not elected to the legislature in proportion to their population did not prove discrimination "absent evidence and findings that [blacks] had less opportunity than did [whites] to participate in the political processes and to elect legislators of their choice, noting:

> We have discovered nothing in the record or the court's findings indicating that poor negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen.

Whitcomb, 403 U.S. 149.

It is clear, then, that elections are not "the whole point of voting," as the district court held *Jeffers*, 730 F.Supp. 204, J.S. Appx. 15, and they are certainly not the whole point of the Voting Rights Act. Clearly, the act requires that Respondents show more than a lack of opportunity to elect representatives of their choice in order to make out a claim. As Justice Marshall has noted:

> [This Court has] held that, in order to prove an allegation of vote dilution, the plaintiffs must show more than simply that they have been unable to elect candidates of their choice . . . when all that is proved is mere lack of success at the polls, the court will not presume that members of a political minority have suffered an impermissible dilution of political power. Rather, it is assumed that these persons have means available to them through which they can have some effect on government decision making. . . . in the absence of evidence to the contrary, it may be assumed that if officials will not be improperly influenced by such factors as the race or place or residence of persons seeking governmental action. Furthermore, political factions out of office often serve as watchdogs on the performance of the government, binding together into coalitions having enhanced influence, and have the respectability necessary to affect public policy.

Mobile v. Bolden, 466 U.S. 55, 111, n.7 (1980), (Marshall, J. dissenting).

It should be recalled that Section 2 was amended in response to the holding of the Court in *Mobile v. Bolden*. In amending Section 2, Congress was attempting to restore the standard established in *Whitcomb* and *White*, as explained by Justice Marshall in the foregoing quotation. Clearly, then, the district court erred as a matter of law in holding that elections were all that mattered.

The majority's interpretation of Section 2 also ignores a common thread that runs throughout this Court's vote's

dilution opinions: the perception that an electoral system which allegedly dilutes the votes of minority leaves that minority effectively unrepresented. *See, Gingles*, 478 U.S. 30, 48 n. 14 (1986); *Davis v. Bandemer*, 478 U.S. 109, 131, 132, 151-52 (1986); *Rogers v. Lodge*, 458 U.S. 613, 625 (1982); *White*, 412 U.S. 755, 767, 769 (1973). Because "the power to influence the political process is not limited to winning elections," *Davis*, 478 U.S. 132, the Court consistently has considered responsiveness of the public body in question to be an important element in deciding vote dilution claims. *Rogers*, 458 U.S. 625 n.9. As noted by this Court, "an individual or group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. We cannot presume in such a situation, without actual proof to the contrary, that candidate elected will entirely ignore the interests of those voters." *Davis*, 478 U.S. 132. Therefore, when legislative unresponsiveness is demonstrated, less opportunity to participate in the political process has been found. *See, Rogers*, 458 U.S. 625; *White*, 412 U.S. 755. In the context of single member district[8] vote dilution claims, absent proof of legislative unresponsiveness or actual legal barriers to registration and voting, Respondents must be required to prove something other than the inability to elect blacks in order to prove "less opportunity to participate in the political process." c.f. *White*, 412 U.S. 765-66 ("It is not enough that the racial group allegedly discriminated against does not have legislative seats in proportion to its voting potential . . . ." *Whitcomb*, 403 U.S. 156 (wherein the Court rejected the proposition that "any group with distinctive interests must be presented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single member district.") The majority below specifically found that the legislators in the districts in issue were not

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[8]multi-member districts appear to have received greater scrutiny, given their perceived tendency to dilute a minority's voting strength. *See, Gingles*, 478 U.S. 46 n. 11, 47, 87.

unresponsive, nor were there any presently existing legal barriers to blacks being able to register or vote in Arkansas. In sum, there simply was no evidence that, as a result of the way that the 1981 apportionment lines were drawn, blacks had "less opportunity to participate in the political process." Absent such evidence, the majority's finding of a Section 2 violation was legally incorrect and clearly erroneous. 42 U.S.C. §1973(b); *Gingles*, 478 U.S. 98 (O'Conner concurring).

II. THE DISTRICT COURT'S ULTIMATE LEGAL CONCLUSION THAT ARKANSAS' 1981 LEGISLATIVE APPORTIONMENT PLAN VIOLATED SECTION 2 WAS BASED UPON ITS ERRONEOUS APPLICATION OF THE LEGAL STANDARDS IDENTIFIED IN *GINGLES*.

a. The District Court imposed a proportionality standard in violation of Section 2 by elevating maximization of the black vote over all other legitimate state concerns. The District Court misapplied the *Gingles* standard to the single member districts in issue. In *Gingles* this Court interpreted Section 2 of the Voting Rights Act and established a framework for its application to multi-member districts. The Court held that a multi-member districting scheme may violate Section 2 if the district contains a bloc voting majority which is usually able to defeat candidates supported by a politically cohesive, geographically compact minority group. 478 U.S. 48. Put another way, the court's holding in *Gingles* means that, in order to prove a violation of Section 2, a plaintiff must show that (1) the challenged district contains a geographically compact minority group within its borders which is large enough to form a majority in a single-member district; (2) the minority group is politically cohesive and (3) a bloc voting majority usually defeats the minority' preferred candidates. *See, McNeil v. Springfield Park District*, 851 F.2d 937, 942 (7th Cir. 1988); *Smith v. Clinton*, 687 F.Supp. 1310, 1314-1315 (E.D. Ark. 1988) (hereinafter *Smith I*); *Jeffers*, 730 F.Supp. 205. Only when there is a "conjunction" of these circumstances may the court find a violation of Section 2. *Gingles* 478 U.S. 48.

This appeal does not directly involve a multi-member districting scheme. Although the majority below found that the only multi-member district in issue did *not* violate Section 2, it did find that Arkansas' single-member districts in parts of east, south, and central Arkansas violated the statute. The majority based its ruling on a finding that the *Gingles* preconditions applied to single-member districts and that those preconditions were proven by Respondents. *Jeffers*, 730 F.Supp. 208-09. While the *Gingles* formulation does not fit neatly in a single-member district situation, the majority below applied it anyway.[9] This case presents the Court with an opportunity to clarify the application of the Voting Rights Act and the *Gingles* standards in single-member districting situations for the many states and communities vitally affected by this issue. Furthermore, and of utmost importance to the applicants in this case, it gives the Court the opportunity to correct an erroneous interpretation of the Voting Rights Act and an erroneous application of the *Gingles* standard, which, if allowed to stand, will affect districting decisions throughout the nation. The following discussion is grounded on the assumption that the *Gingles* preconditions would apply, in some form, to single-member district cases.

b. The Compactness Requirement. Respondents did not show that blacks were a geographically insular minority who would form a majority in a compact and contiguous single-member district. According to the 1980 census, which the court used in determining liability and the remedy in this case, Arkansas' black population was concentrated in small cities in eastern and southern Arkansas and in urban areas in central Arkansas. When the 1981 Board of Apportionment drew legislative districts, the ideal House district size was 22,855 and the ideal Senate district size was 65,300 under the one-man-one-vote principle. Throughout the State, cities with less than 22,500 population were totally included within one House district. The only cities that were split were those too populous

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[9] The majority in *Gingles* specifically refrained from deciding whether the Section 2 analytical framework for multi-member districts would be applicable to evaluations of single member districts. *Gingles*, 478 U.S. 46 n.12.

to be included completely within one House district. The same held true for Senate seats, except for the city of Pine Bluff (population 63,114) which had been split in the 1971 apportionment and was left that way in 1981. No one approached the 1981 Board and requested that it be changed.

In 1981, the Board drew one majority black House district in Pine Bluff, the third-largest city in Arkansas, and a three-member majority black at-large district in Pulaski County, which includes the State's largest city, Little Rock. The Board also drew one majority black Senate district in Pulaski County which had boundaries coterminous with the multi-member House district.

At trial, Respondents sought to show that majority black voting age population single-member districts could be drawn in eastern Arkansas. However, they could not meet this burden by drawing districts in which small cities remained intact within their own legislative districts. Instead, Respondents created an alternative districting plan which split small cities in eastern and southern Arkansas. Thus, six of eight proposed House districts and one of two proposed Senate districts split small cities to construct the "correct" racial populations. Distinct communities of interest were obliterated in Respondents' proposed Districts. Only Respondents' proposed districts in Jefferson County did not carve up small cities. At trial, all three members of the 1981 Board of Apportionment testified that they would never have considered splitting small cities the way the Respondents had, and that the reason they had included small cities within single districts was to preserve those cities' distinct communities of interest.

The district court held that Respondents' alternative districts satisfied the threshhold requirements of *Gingles* and, furthermore, ordered that the State adopt an apportionment plan based on those districts. In so doing, the district court misapplied the compactness requirement.

For the *Gingles* "compactness" requirement, the relevant question should be whether the minority population is so concentrated that, if districts were drawn pursuant to accepted non-racial criteria, there is a reasonable possibility that a district could be drawn which could give the racial minority a voting majority. *See*, Blacksher and Menefee, "From *Reynolds v. Sims to City of Mobile v. Bolden*," 34 Hastings L.J. 1, 55-56 (1982). Where it is not possible to draw such a district pursuant to accepted non-racial criteria, as in the case of a substantially integrated district, the form of the district cannot be responsible for minority voters' inability to elect candidates of their choice. *See, Gingles*, 478 U.S. 50-51.

In the 1981 apportionment plan, no small cities were split. The Petitioners contend that splitting small cities for the sole purpose of racially gerrymandering a district is, *inter alia*, to make that district non-compact and, therefore, violative of the *Gingles* standard. The evidence at trial clearly showed that districts such as those proposed by Respondents could not possibly have been drawn following the non-racial criteria set out by the 1981 Board of Apportionment. Preserving the integrity of municipal boundaries and other political subdivisions was an element of compactness that was followed by the Board and has long been recognized by the courts. *See, Davis v. Bandemer*, 478 U.S. 109, 173, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986) (Powell J. concurring in part and dissenting in part); *Karcher v. Daggett*, 462 U.S. 725 (1983); *Major v. Treen*, 574 F. Supp. 325, 335-336, 353-354 (E.D. La. 1983); *Romero v. City of Pomona*, 883 F.2d 1418 (9th Cir. 1989); *Taylor v. McKeithon*, 499 F.2d 893, 1905 (5th Cir. 1974); *Gunn v. Chickasaw County, Mississippi*, 705 F.Supp 315, 323 (N.D. Miss. 1989); *Jordan v. Winter*, 604 F. Supp. 807, 814 (N.D. Miss. 1984); *Graves v. Barnes*, 446 F.Supp. 560, 569 (W.D. Tex. 1977).

The effect of the court's order in this case would be to require the State of Arkansas to district one part of the State in accordance with legitimate, non-racial criteria (preserving township, city, and precinct boundaries, etc.)

and to sacrifice those criteria solely in favor of racial considerations in another part of the State. This Court apparently did not intend such a result in *Gingles*.

c. The Cohesiveness Requirement. Plaintiffs did not show the required political cohesiveness. This Court has held that:

> The inquiry into the existence of vote dilution caused by submergence in a multi-member district is district specific. When considering several separate vote dilution claims in a single case, courts must not rely on data aggregated from all the challenged districts and concluding that racially polarized voting exists in each district.

Gingles, 478 U.S. 59, n.28. As Justice Brennan pointed out, the trial court in *Gingles* "relied on data that were specific to each individual district in concluding that each district experienced legally significant racially polarized voting." *Id.*

In this case, Respondents proposed districts in which the voters had never voted together before on state legislative races. As a result, they put on no evidence concerning voting patterns in their proposed districts in any particular legislative race. In some instances, as the dissent noted, "the plaintiffs might put on evidence showing polarized voting in one of those counties but then make no effort to show that blacks in adjacent counties who would be incorporated in the proposed new house district, identified with the policies and the positions of the blacks in that county. In other words, proof that the blacks from different political jurisdictions who were incorporated into a proposed new district were 'politically cohesive,' has not been required." J.S. Appx. 208.

The dissent also noted that there were very few endogenous elections offered by Respondents at all. *Id.* Indeed, Respondents could find only ten races for

legislative seats in which black candidates ran against white candidates. There was no discussion in the majority opinion of how these races, which were held in only parts of the Respondents' proposed districts, showed cohesiveness of either black or white voters.

Racial bloc voting cannot be assumed. *Gingles*, 478 U.S. at 46. Respondents fell far short of shouldering their burden of proof in this regard. Here, Respondents did not present evidence, (and the majority did not find) that voting was polarized in their proposed alternative districts. Respondents and the majority apparently assumed that if blacks were cohesive in one part of Respondents' proposed districts, they would be cohesive districtwide. This assumption is erroneous according to *Gingles*.

Additionally, it was improper for the court to rely only on exogenous elections to "prove" polarized voting if there was not at least one endogenous election from which to make such a showing. *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987). Respondents did not offer proof of any endogenous elections in any part of many of their proposed districts and, therefore, failed to prove a necessary prerequisite to their Voting Rights Act challenge. For the same reason, they also have failed to prove that a white majority voted sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate.

The critical nature of such district-specific proof is highlighted in this case by the court's finding that the legislators elected under the 1981 apportionment plan were *not* unresponsive to blacks. Indeed, the evidence showed that they were very responsive to their black constituents. Few blacks ran for legislative office, and none were successful because they opposed popular, long-term incumbents who were responsive to *all* of their constituents. Having failed to conduct the proper district-specific inquiry required by Section 2, the majority clearly erred in assuming that the essential element of political cohesiveness existed.

III. THE DISTRICT COURT IMPROPERLY FAILED TO DEFER TO PETITIONERS' PROPOSED REMEDIAL PLAN AND IMPROPERLY REQUIRED THE CREATION OF RACIALLY GERRYMANDERED SUPER-MAJORITY DISTRICTS.

The majority below erroneously held that it was required to reject three of Petitioners' proposed remedial districts, which had black voting age populations between 55% and 58%, in favor of super-majority districts having black voting age populations over 60% because it felt that anything less than 60% would be inadequate to remedy disadvantages imposed by "centuries" of past injustice. J.S. Appx. 197. By so holding, the majority not only improperly substituted its judgment of a more equitable remedy for that of Petitioners, but also construed Section 2 in a manner never intended by Congress.

Following Respondents' objections, the majority held that two of Petitioners' eight proposed House Districts, which had black voting age populations of 56% (HD 75) and 58% (HD 74), and one of Petitioners' two proposed Senate Districts, which had a black voting age population of 55% (SD 30), violated Section 2 "simply because they [were] (1) below 60% BVAP and (2) easily expanded without sacrificing principles of compactness and contiguity." J.S. Appx. 199. Notwithstanding the majority's inconsistent application of its own standards,[10] its rejection of Petitioners' proposed remedial districts violates the principles governing a federal court's review of legislative plans submitted in order to remedy judicially established violations of Section 2.

Contrary to the majority's opinion, there is no controlling precedent that requires "something on the order of a 60% BVAP . . . to remedy a vote dilution violation of the Voting Rights Act." J.S. Appx. 197. The *Smith* court based

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[10]See Note 12 *infra* and accompanying text.

its "60% rule" on its assumption that blacks registered and voted in lower proportions than did whites, *compare, Smith I,* 687 F.Supp. 1318 ("Neither side has presented convincing evidence about the voter registration rates of the respective races.") *with Smith v. Clinton,* 687 F.Supp. 1361, 1363, n.3 (E.D. Ark. 1988) (remedy opinion, hereinafter "*Smith II*") ("We think it is reasonable to infer lower registration and participation [based on income and educational census statistics]."), and the majority holding in *Ketchum v. Byrne,* 740 F.2d 1398, 1413-16 (7th Cir. 1985) *cert. denied* 471 U.S. 1135. Such "assumptions" clearly are contrary to the factually specific nature of the inquiry required in vote dilution cases.[11]

Ketchum itself is questionable authority for an across-the-board 60% rule-of-thumb because the *Ketchum* court addressed, *inter alia,* a "regression" violation of the Voting Rights Act. *Id.* at 1402. "Regression" remedies are aimed at *restoring* the number of districts held by minorities which have been reduced by the electoral mechanism under attack. *Id.* at n.2. No such "restoration" issue should be involved in a redistricting case, such as the present case, given Secion 2's proscription against proportional representation. 42 U.S.C. §1973(b). Other than proportionality, there is no "standard" to which Respondents could be restored. Therefore, the justification for the majority 60% rule of thumb "must arise out of peculiar facts in this action warranting a finding that Petitioners' proposals were legally unacceptable." *McGhee v. Granville County,* 860 F.2d 110, 115 (4th Cir. 1988); *see, Upham v. Seamon,* 456 U.S. 37, 41-42 (1982).

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[11]The majority cited its own opinion in *Smith v. Clinton,* 687 F.Supp. 1361, 1362-63 (E.D. Ark.) *aff'd mem.* 109 S.Ct. 548 (1988), as binding on its remedy decision in this case. The remedy in each case, however, should turn on the facts peculiar to the violation found. *Cf. Gingles,* 478 U.S. 45, 59, n.2 (the searching for practical evaluation of district specific data appears to be required). Of course, the remedy imposed by the *Smith* court was not an issue in that appeal. This court is not bound by *Smith* because "it is not at all unusual for the court to find it appropriate to give consideration to a question that has been the subject of previous summary action." *Davis,* 478 U.S. 121.

The majority's finding that Petitioners' proposed districts "would have been held unlawful at the liability stage of this case," J.S. Appx. 199, rests on its inconsistent application of its own legal standards. Assuming *arguendo* the validity of the majority's "60% rule"[12] the majority itself did not apply that rule consistently when it *approved* the five house districts proposed by Petitioners that were below 60% in black voting age population.[13]

That Petitioners' proposed districts could have been "easily expanded without sacrificing principles of compactness and contiguity," J.S. Appx. 199, could not have been the controlling factor in the majority's decision to reject them; the majority specifically declined to increase another of Petitioners' proposed senate district black voting age population over 58% even though "a higher BVAP in S.D. 27 could have been obtained simply by adding certain portions of the City of Pine Bluff to the district instead of a largely white township, Cane Creek, located in Lincoln County."[14] J.S. Appx. 201. Therefore, the majority's sole reason for rejecting three of the districts proposed by Petitioners in favor of those proposed by Respondents must have been only because Respondents objected to them.

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[12]"Defendants' five other proposed black-majority house districts (38, 80, 83, 88 and 100) are all below 60% BVAP, but they are not for that reason unlawful." J.S. Appx. 198.

[13]The majority appeared to recognize that "on a strictly numerical and quantitative view of equality, any district with a BVAP of 50% or higher would be *per se* lawful." J.S. Appx. 197.

[14]As observed by the dissent, "it must be mentioned briefly that the plaintiffs' proposed remedial plan cannot be accurately characterized as a simple expansion of district boundaries which are as compact and contiguous as those districts proposed by the Board of Apportionment. Plaintiffs' alternative plan creates a number of oddly-shaped House districts, the worst being the inverted-"S" configuration of the boundaries for HD 74. If one were to travel in a perfectly straight line, he or she could enter and exit this district no less than eight times as the district cuts through townships and municipal boundaries across three counties in an awkward effort to capture sufficient black residents to comprise a super-majority of 63% black VAP." J.S. Appx. 207.

Such objections, alone, do not provide the legal basis for holding that Petitioners' proposed districts violated Section 2. Indeed, such a holding ignores the deference that courts are required to give remedies proposed by the local defendants, *Upham*, 451 U.S. 41; *McGhee, supra*, and results in substitution of the district court's political judgments for those which should have been left to Respondents. As observed by the dissent, "Is this not 'ad hocery' and judicial subjectivity at its zenith?" J.S. Appx. 219.

The majority's failure to defer to petitioners' proposed remedy appears to stem from its perception that Section 2 is an "affirmative action" measure, designed not to provide equal opportunity for political participation by minorities, but rather to provide a guarantee of minority electoral success. Nothing in Section 2 or its legislative history indicates that Congress intended such a result.

Section 2 itself explicitly disavows the concept that a minority is entitled to represented in numbers equal to its proportion in the population.[15] 42 U.S.C. §1973(b). Its amendment in 1982 was designed to remove the discriminatory intent test from Section 2 vote dilution cases. *Gingles*, 478 U.S. 43. In returning to "the legal standard that governed voting discrimination cases prior to (*Mobile v. Bolden*, 446 U.S. 55)," *Id.* at 44, n.8, Congress relied on the law as developed under pre-*Bolden* cases. *Id.* None of those cases interpreted Section 2 as an affirmative action statute that mandated proportional representation. *See, e.g. Rogers*, 458 U.S. 617-18; *White*, 412 U.S. 765-66; *Whitcomb*, 403 U.S. 149-50. Absent clear Congressional direction, it appears that reading Section 2 as requiring "something more than" a numerical majority as a remedy to vote dilution findings has no basis in the legislative history

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[15]While "proportional representation" in the work force is a key element of affirmative action plans under Title VII of the Civil Rights Act of 1964, *see, e.g. United Steel Workers of America v. Webber*, 443 U.S. 193 (1979), that concept specifically is disavowed in Section 2 of the Voting Rights Act.

of Section 2, as well as being, arguably, unconstitutional. *See*, J.S. Appx. 197. The majority's questionable interpretation of Section 2 as an affirmative action measure[16] resulted in its failure to afford Petitioners' proposed remedy the deference required by law. Therefore, this Court should note probable jurisdiction and define those circumstances, if any, under which legally acceptable remedial districts must be rejected in favor of racially gerrymandered super-majority districts.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO DISMISS THIS ACTION ON THE BASIS OF LACHES.

Laches is an equitable defense based on the principle that equity aids the vigilant, not those who sleep on their rights. *Stone v. Williams*, 873 F.2d 620, 623 (2nd Cir. 1989). It consists of two elements: unreasonable and inexcusable delay by Respondents in bringing the action and prejudice to Petitioners caused by that delay. *Id.* at 624; *McGovern v. Connoly*, 637 F.Supp. 111, 116 (D. Mass. 1986). Its application depends upon the equitable circumstances peculiar to each case. *Stone*, 873 F.2d 623-24. When, as here, Respondents have unreasonably and inexcusably waited to bring their action until the last election under the apportionment plan in issue, on the eve of Arkansas' constitutionally mandated decennial reapportionment, laches bars the relief they seek. *See, MacGovern*, 637 F.Supp. 116; *Simkins v. Gressette*, 631 F.2d 287, 295 (4th Cir. 1980); *Maryland Citizens for a Representative General Assembly v. Governor of Maryland*, 429 F.2d 606, 610 (4th Cir. 1970).

It is the unreasonableness of the delay, not the number of years that have passed, that is the focus of the laches inquiry. *Stone*, 873 F.2d 624. Respondents have offered no

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[16] *But see, Gingles*, 478 U.S. 44 n.9.

excuse for their failure to bring the instant action before now.[17]

The census figures upon which they rely have been available since 1980. In fact, Respondents have had possession of copies of the very census tapes used by the Board of Apportionment since 1981. 730 F.Supp. 221; J.S. Appx. 52. Section 2 of the Voting Rights Act was amended to substitute the "totality of the circumstances" test, the theory under which Respondents proceeded, in 1982. Over twenty Section 2 cases were brought between the time Section 2 was amended and this Court decided *Gingles*. Assuming *arguendo*, that the Section 2 analysis employed in *Gingles* must be applied mechanically and uncritically to single member districts, Respondents have had knowledge of that analysis since the middle of 1986, yet they inexplicably waited until January 27, 1989 before bringing this action. Under these circumstances, respondents delay in bringing this action clearly is inexcusable.[17] *See, Simkins*, 631 F.2d 296; *MacGovern*, 637 F.Supp. 116.

However, there also must be prejudice to Petitioners as well as inexcusable delay for this action to be barred by laches. *Id.* The evaluation of prejudice "is integrally related to the inquiry regarding delay. Where there is no excuse for delay . . . (Respondents) need show little prejudice. . . ." *Stone*, 873 F.2d 625. Economic harm to the State, should Respondents prevail, is legally sufficient prejudice. *Cornetta v. United States*, 851 F.2d 1372, 1378 (Fed. Cir. 1988). That harm to Arkansas is apparent from the majority's recognition that "our ruling on the statutory claim will require substantial adjustments in the existing apportionment plan. * * * The task will not be simple. It

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[17]The majority's attempt to excuse Respondent's delay by noting that proof of legally significant racial bloc voting requires that the challenged structure have been in place for some time is contrary to the observation in *Davis* that historical voting patterns and projected results may be used to prove vote dilution. *Davis*, 478 U.S. 139 n.17.

is not just a matter of drawing districts that will have a majority-black voting age population. There will inevitably be a ripple effect, necessary changes in the boundaries of adjacent districts. * * * All of this will require a great deal of time, expense, and dislocation, but we believe the Voting Rights Act leaves us no alternative." *Jeffers*, 730 F.Supp. 199, 217, 218, J.S. Appx. 40. As noted by another court, drawing a statewide reapportionment plan is "not a 48 hour job with a calculator . . . ." *MacGovern*, 637 F.Supp. 116.

In determining whether to afford Respondents the equitable relief they request, the Court also should consider the nature of that relief, for "[e]quity demands that a Federal Court stay its hand when judicial relief makes no sense." *Id.* Here, as in *MacGovern*, the relief requested by the respondents would come at great cost without any reasonable assurance of different electoral results and be, at best, ephemeral. The costs in terms of economics and disruption to the State's political process are patent. In addition, any court-ordered reapportionment must be based upon census figures now 9 years out of date. *See, McNeil*, 851 F.2d 946. The staleness of the data upon which the Petitioners are required to rely is the direct result of respondents' lack of diligence in pursuing their claim. Given that "demographic patterns are like shifting sands," *Marshall v. Edwards*, 582 F.2d 927, 937 (5th Cir. 1978). there is absolutely no reason to believe that districts drawn according to stale census data will produce different electoral results. Finally, any court-ordered reapportionment would last only one year, for the State will, again, reapportion in 1991 following the 1990 federal decennial census. Ark. Const. Art. 8, Section 4. When these factors are weighed against the alleged harm to respondents of participating in one more election based on a questionably invalid districting plan, equity requires that relief be denied. *See, MacGovern*, 637 F.Supp. 116. To permit Respondents' Section 2 challenge to a statewide legislative districting plan under which only one election

remained to be held was an abuse of discretion because it necessitated the use of suspect data to fashion an ephemerial and perhaps illusory remedy whose implementation worked inequitably hardship upon Petitioners.

CONCLUSION

This is the first opportunity that the Court has had to address Section 2 and its application to single-member districts in a state-wide reapportionment plan since the statute was amended in 1982. If the district court was correct in holding that proof that Respondents had less opportunity to elect candidates of their choice would suffice to establish a Section 2 claim, ~~and~~ then any system under which minority fails to achieve proportional representation may be challenged successfully. Further, if the district court's decision on remedy is allowed to stand, every proposed remedial device that fails to insure minority electoral success is contrary to Section 2. Obviously, the results reached by the district court below are contrary to Section 2 and should be reversed.

Petitioners respectfully request that the Court note probable jurisdiction of this action and require plenery consideration of the questions presented herein, with briefs on the merits and oral argument.

Respectfully submitted,

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